

No. 14631

United States
Court of Appeals
for the Ninth Circuit

In the Matter of

HARRY SMITH MACHINE COMPANY, a California Corporation,

Debtor.

SAMUEL A. MILLER and MASON & WALLACE,

Appellants.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILED

MAR 21 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

SAMUEL A. MILLER,
MASON & WALLACE,
700 Lane Mtge. Bldg.,
Los Angeles 14, Calif.

In the District Court of the United States, Southern District of California, Central Division

No. 60220-C

In the Matter of

HARRY SMITH MACHINE COMPANY, a California Corporation,

Debtor.

**PETITION OF DEBTOR FOR APPOINTMENT
OF ATTORNEYS**

To the Honorable District Court of the United States, for the Southern District of California, and to the Honorable David B. Head, Referee Herein:

The petition of Harry Smith Machine Company, a corporation, by and through Harry Smith, its President, respectfully shows:

I.

That your petitioner is the debtor in possession, having filed a proceeding in the above-entitled Court under Chapter XI of the Bankruptcy Act, which petition is now pending in this Court.

II.

That said petition and all of the moving papers in connection therewith, including schedules, statements of affairs, petitions and orders thus far presented and entered in this matter or to be prepared and entered in this matter were prepared or will be prepared by your petitioner's attorneys, Samuel A. Miller and Messrs. Mason & Wallace.

III.

That in the course of these proceedings it will be necessary for your petitioner to have counsel for the purpose of representing it in all steps of this proceeding. That your petitioner is desirous of employing Samuel A. Miller and Messrs. Mason & Wallace, attorneys duly admitted to practice in the above-entitled Court (that Samuel A. Miller of said firm of attorneys specializes in bankruptcy matters), to perform all necessary legal services for it in this matter, and that your petitioner is advised and believes and therefore alleges that it is for the best interest of its estate as debtor in possession to have said Samuel A. Miller and Messrs. Mason & Wallace retained under a general retainer as attorneys herein.

IV.

That your petitioner is advised and believes and therefore alleges that said attorneys represent no interest adverse to the estate in the matters upon which they are to be engaged and that their employment will be to the best interests of the estate.

Wherefore, your petitioner prays that an order be made and entered appointing said Samuel A. Miller and Messrs. Mason & Wallace as attorneys for the debtor in these proceedings.

**HARRY SMITH MACHINE
COMPANY,
A Corporation,**

By /s/ **HARRY A. SMITH,**
President.

SAMUEL A. MILLER,
MASON & WALLACE,

By /s/ SAMUEL A. MILLER,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed March 23, 1954, Referee.

[Endorsed]: Filed January 13, 1955.

[Title of District Court and Cause.]

**ORDER APPOINTING ATTORNEYS
FOR DEBTOR IN POSSESSION**

Upon reading and filing the verified petition of Harry Smith Machine Company, a corporation, and it appearing therefrom that it will be to the best interest of the estate to employ Samuel A. Miller and Messrs. Mason & Wallace upon a general retainer as attorneys for the Debtor in possession, and good cause therefor appearing, now, therefore—

It Is Hereby Ordered, Adjudged and Decreed that Samuel A. Miller & Messrs. Mason & Wallace be, and they are hereby appointed attorneys, for the debtor in possession in the above-entitled matter under a general retainer, and that they shall be compensated for their services out of the estate of the debtor.

Dated: March 23, 1954.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed March 23, 1954, Referee.

[Endorsed]: Filed January 13, 1955.

[Title of District Court and Cause.]

**PETITION FOR ARRANGEMENT UNDER
SECTION 322**

To the Honorable Judges of the District Court of the United States, for the Southern District of California, Central Division:

The petition of Harry Smith Machine Company, a California corporation, of 5300 West Century Boulevard, in the City of Los Angeles, County of Los Angeles, State of California, and engaged in the operation of an automatic screw machine business, respectfully represents as follows:

I.

Your petitioner has had its principal place of business at 5300 West Century Boulevard, City of Los Angeles, County of Los Angeles, State of California, within the above Judicial District, for a longer portion of the six (6) months immediately preceding the filing of this petition than in any other Judicial District.

II.

No bankruptcy proceeding initiated by a petition by or against your petitioner is now pending.

III.

Your petitioner is unable to pay its debts as they mature and proposes the following arrangement with its creditors:

A. The debts of your petitioner to be affected by this plan of arrangement shall be as follows:

1. All debts which have priority under Section 64a (1), (2) and (4) of The Bankruptcy Act.

2. All debts which are unsecured, including the claims, if any, arising from the rejection of executory contracts.

B. The debts of your petitioner as above set forth shall in this plan of arrangement be treated as follows:

1. All debts included in Class A (1) are to be paid in cash in full upon the signing of the Order of Confirmation of the plan, or to be paid at such time and in such installments as may be agreed upon by and between your petitioner and the various Taxing Agencies having claims coming within this class of indebtedness.

2. All debts included in Class A (2) shall be paid as follows:

(a) Sixty (60%) per cent of the amount due unsecured creditors as scheduled or as proved and allowed by the Court, when paid as hereinafter designated, shall be accepted by the unsecured creditors as full payment of their indebtedness and shall constitute full payment of the indebtedness of unsecured creditors. Said sixty (60%) per cent to be paid as follows:

(b) Five (5%) per cent of the amount due to general unsecured creditors to be paid in cash ninety (90) days after the signing of the Order of Confirmation of the plan, and a like five (5%) per cent each and every thirty (30) days after the first pay-

ment of five (5%) per cent until the general unsecured creditors shall have been paid a total of sixty (60%) per cent of the amount of their claims as scheduled or as approved and allowed by the Court. Deferred payments to be without interest unless there is a default in payment on the due date, in which event the faulted installments only shall bear interest at the rate of five (5%) per cent per annum, and shall be evidenced by a note to be dated as of the date of the signing of the Order of Confirmation.

IV.

The funds to pay the various payments herein provided for are intended to be raised by the debtor from a more efficient and more successful operation of its business and come out of income, and to this end it is proposed that the debtor shall continue the operation of its business from the date of the filing of this proceeding until the terms of the plan are accepted by the creditors as required by law and confirmed by the Court.

V.

Any and all debts incurred after the filing of the original petition under Section 322 of Chapter XI of The Bankruptcy Act and prior to the confirmation of the plan of arrangement shall be paid in cash in full upon confirmation, except that the time of payment of all or any part of such debts may be extended by agreement with the creditors to whom such debts are due, and such extended debts shall, when due, have priority payment over the debts to be affected by this arrangement.

VI.

The debtor shall have the right and reserves the right to appear and contest any and all claims filed in this proceeding.

VII.

The debtor likewise reserves the right to hereafter file a schedule of the executory contracts which it may desire to reject if it is so advised.

VIII.

Upon confirmation and performance of the terms of this petition your petitioner shall be discharged from all liabilities or claims affected by this plan.

IX.

The Court shall retain jurisdiction until the deposit and distribution of the note and funds herein provided for and the hearing and disposition of any claims that may be objected to.

X.

The schedules hereto annexed marked Exhibit "A," verified by your petitioner's oath, contain a full and true statement of all of its debts insofar as it is possible to ascertain, including the names and places of residence or business of its creditors, and such further statements concerning said debts as are required by the provisions of the Acts of Congress relating to Bankruptcy.

XI.

The schedules hereto annexed marked Exhibit "B," verified by your petitioner's oath, contain an

accurate inventory of all of its property as nearly as it is able to ascertain the same, both real and personal, and such further statements concerning said property as are required by the provisions of said Act.

XII.

That there is not annexed hereto at this time a statement of executory contracts as required by the provisions of said Act, but your petitioner reserves the right to submit such statement concerning executory contracts if it be so advised.

XIII.

The statement hereto annexed marked Exhibit "C," verified by your petitioner's oath, contains a full and true statement of its affairs as required by the provisions of said Act.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance with the appropriate provisions of Chapter XI of "The Bankruptcy Act."

HARRY SMITH MACHINE
COMPANY,
A California Corporation;

By /s/ HARRY A. SMITH,
Petitioner.

SAMUEL A. MILLER,
MASON & WALLACE,

By /s/ SAMUEL A. MILLER,
Attorneys for Petitioner.

Duly verified.

Summary of Debts and Assets

(From the Statements of the Debtor in
Schedules A and B)

Schedule A 1-a—Wages	none
Schedule A 1-b (1)—Taxes due United States	\$ 3,600.16
Schedule A 1-b (2)—Taxes due States ...	904.05
Schedule A 1-b (3)—Taxes due counties, districts and municipalities	1,563.27
Schedule A 1-c (1)—Debts due any person, including the United States, having pri- ority by laws of the United States	2,305.56
Schedule A 1-c (2)—Rent having priority	1,750.00
Schedule A 2—Secured claims	17,653.14
Schedule A 3—Unsecured claims	37,509.06
Schedule A 4—Notes and bills which ought to be paid by other parties thereto	none
Schedule A 5—Accommodation paper ...	none
<hr/>	
Schedule A, total	\$65,285.24
<hr/>	

Schedule B 1—Real estate	none
Schedule B 2-a—Cash on hand	\$ 72.66
Schedule B 2-b—Negotiable and non-nego- tiable instruments and securities	none
Schedule B 2-c—Stocks in trade	3,609.86
Schedule B 2-d—Household goods, furni- ture & fixtures	3,444.50
Schedule B 2-e—Books, prints and pic- tures	none
Schedule B 2-f—Horses, cows and other animals	none

Schedule B 2-g—Automobiles and other vehicles	2,879.59
Schedule B 2-h—Farming stock and implements	none
Schedule B 2-i—Shipping and shares in vessels	none
Schedule B 2-j—Machinery, fixtures and tools	120,475.14
Schedule B 2-k—Patents, c o p y r i g h t s, trade-marks	none
Schedule B 2-1—Other personal property	none
Schedule B 3-a—Debts due on open accounts	4,044.46
Schedule B 3-b—Policies of insurance	none
Schedule B 3-c—Unliquidated claims	none
Schedule B 3-d—D e p o s i t s of money in banks and elsewhere	none
Schedule B 4—Property in reversion, remainder, expectancy or trust	none
Schedule B 5—Property claimed as exempt	none
Schedule B 6—Books, deeds and papers	none
 Schedule B, total	 \$134,526.21

HARRY SMITH COMPANY,
A California Corporation;

By /s/ **HARRY A. SMITH,**
President,
Petitioner.

* * *

HARRY SMITH MACHINE
COMPANY,
A California Corporation;

By /s/ HARRY A. SMITH,
President,
Bankrupt or Debtor.

SAMUEL A. MILLER,
MASON & WALLACE,

By /s/ SAMUEL A. MILLER,
Attorney for Petitioner.

Oath to Statement of Affairs

State of California,
County of Los Angeles—ss.

I, Harry Smith, President, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

/s/ HARRY A. SMITH,
President,
Bankrupt or Debtor.

Subscribed and sworn to before me this 25th day of March, 1954.

[Seal] /s/ RUTH KLEIN,
 Notary Public.

[Endorsed]: Filed March 26, 1954, Referee.

[Endorsed]: Filed April 1, 1954.

[Title of District Court and Cause.]

A M E N D M E N T T O P E T I T I O N F O R
A R R A N G E M E N T U N D E R S E C T I O N 3 2 2

To the Honorable Judges of the District Court of the United States, for the Southern District of California, Central Division, and to the Honorable David B. Head, Referee Before Whom Said Above-Entitled Matter Is Pending:

The Debtor herein does hereby amend its petition for arrangement heretofore filed on March 26th, 1954, in the following particulars:

In addition to the payment of sixty (60%) per cent of the amount due unsecured creditors included in Class A (2) as presently set forth, the Debtor further agrees to pay the balance of forty (40%) per cent after the payment of sixty (60%) per cent, so that all general unsecured creditors shall ultimately be paid 100c on the dollar, said additional forty (40%) per cent to be paid as follows:

Thirty (30) days after the completion of the payment of sixty (60%) per cent in the manner presently set forth in the original plan on file herein the debtor shall pay five (5%) per cent of the remaining forty (40%) per cent and each and every thirty (30) days thereafter pay a like amount of five (5%) per cent of the remaining forty (40%) per cent until all general unsecured creditors have been paid in full. Said remaining forty (40%) per cent shall be evidenced by a note to be dated as of the date of the signing of the Order of Confirma-

tion, but shall be without interest unless there is a default in payment on the due date, in which event the defaulted installments only shall bear interest at the rate of five (5%) per cent per annum.

That it appears to your petitioner that no further notice is required to be sent to the general unsecured creditors by reason of the fact that their positions are not adversely affected by this amendment.

Wherefore, your petitioner prays that proceedings may be had upon this amendment in accordance with the appropriate provisions of Chapter XI of "The Bankruptcy Act."

HARRY SMITH MACHINE
COMPANY,
A California Corporation;

By /s/ HARRY A. SMITH,
Petitioner.

SAMUEL A. MILLER,
MASON & WALLACE,

By /s/ SAMUEL A. MILLER,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed April 13, 1954, Referee.

[Endorsed]: Filed April 15, 1954.

[Title of District Court and Cause.]

ORDER CONFIRMING ARRANGEMENT

The application of Harry Smith Machine Company, a California corporation, the above-named Debtor, for confirmation of its arrangement under Chapter XI of "The Bankruptcy Act," proposed by said Debtor in its petition filed by it on the 26th day of March, 1954, and amended on the 13th day of April, 1954, having come on regularly to be heard before me, the undersigned Referee in Bankruptcy, and it appearing that due notice having been given to all persons entitled thereto, and the attorneys for the Debtor having represented in Open Court that the proposed plan as amended has been accepted in writing by a majority in number of all creditors affected by the plan, whose claims have been proved and allowed, which number represents a majority in amount of such claims, and all parties in interest at such hearing having concurred in such representation to the Court, and no one having appeared in opposition to the confirmation of said arrangement; and

It appearing that the tax claims entitled to priority having been paid and such other deposit required by the provisions of said Chapter and said arrangement has been deposited subject to the Order of the Court; and

It further appearing and the Court being satisfied that the provisions of said Chapter have been complied with; that said Debtor has not been guilty

of any of the acts or failed to perform any of the duties which would be a bar to its discharge; that the proposal of said arrangement and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by "The Bankruptcy Act"; it is

Ordered, that the Debtor make, execute and deliver direct to the creditors or to their attorneys where represented by attorneys, the notes for sixty (60%) per cent provided for by Section 2, subdivision b of the original plan filed March 26th, 1954, and the note for forty (40%) per cent provided for in the amendment to the plan filed April 13th, 1954, payable at the times and in the percentages therein set forth: and

It Is Further Ordered, that the Court shall retain jurisdiction for a period of eight months from the date hereof for all purposes; that the Debtor file objections to such claims as it desires to object to within twenty (20) days from the date of this Order, and that any and all applications for compensation by the attorneys for the Debtor be likewise filed within twenty (20) days from the date hereof; and

It Is Further Ordered, that the Debtor shall not further encumber its present assets until all creditors have been paid in full, or in the alternative, without first advising the creditors of its intention to further encumber its present assets. This limitation, however, not to interfere with the Debtor's right to factor its accounts receivable in the ordinary course of its business; and

It Is Further Ordered that all creditors of and all claimants against the Debtor are hereby restrained and enjoined from pursuing or attempting to pursue, or from commencing any suits or proceedings at law, or in equity against the Debtor directly, or indirectly, upon any right, claim or interest which any such creditor or claimant may have had against the Debtor at the time of the commencement of this proceeding, excepting only such debts, liabilities and claims as are expressly exempted by law from discharge; and

It Is Further Ordered that title to all of the Debtor's property be and it is hereby re vested in the Debtor corporation; and

It Is Ordered that said arrangement be, and it is hereby confirmed.

Dated at Los Angeles, California, this 9th day of June, 1954.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

Approved as to Form and Contents This 18th day of May, 1954.

CRAIG, WELLER &
LAUGHARN.

By /s/ [Indistinguishable],
Attorneys for Certain
Creditors.

Received May 20, 1954.

[Endorsed]: Filed June 9, 1954, Referee.

[Title of District Court and Cause.]

**PETITION FOR ALLOWANCE TO
ATTORNEYS FOR DEBTOR**

To the Honorable David B. Head, Referee in Bankruptcy in the Above-Entitled Matter:

The petition of Samuel A. Miller and Mason & Wallace, attorneys at law, respectfully represent:

That they were and are at all times herein mentioned attorneys for the above-named Debtor, having been so appointed by an appropriate Order of this Court filed and made on or about the 23rd day of March, 1954. That as such attorneys they have rendered all services necessary to this Debtor in this proceeding and for which they are entitled to be reasonably compensated.

That on the 12th day of March, 1954, your petitioners prepared for the Debtor an original Petition praying for relief under Chapter XI, Section 322 of The Bankruptcy Act; also prepared appropriate resolutions of the Board of Directors authorizing the filing of such Petition; also prepared under date of March 12th, 1954, a Petition for Further Time to File Schedules and appropriate Order thereon, and also prepared the list of creditors required by the appropriate Sections of The Bankruptcy Act.

On March 15th, 1954, your petitioners prepared a "Petition by the Debtor in Possession for Authority to Operate Business and to Pay Compensation,"

and after a conference as between the President of the Debtor corporation, one of the attorneys for the Debtor and the Referee, there was signed an Order authorizing Debtor in possession to operate the business, etc., prepared by the Debtor's attorneys.

That thereafter and on or about the 26th day of March, 1954, your petitioners filed the Schedules of assets and liabilities, and thereafter and on March 26th, 1954, your petitioners prepared and filed Petition for Arrangement Under Section 322.

That thereafter your petitioners received from the office of Gitelson, Ashton, Moore & Coyle a petition on behalf of one, Harold Riel, for leave to sue the debtor corporation in the State Court and a notice thereof, upon which a hearing was held on the 21st day of April, 1954, at which petitioners were present and upon which petition the Court made an appropriate Order.

That under date of April 13th, 1954, after the hearing in Court on the original Petition for Arrangement under date of April 12th, 1954, at 2:00 p.m. your petitioners prepared and filed an Amendment to the original Petition for Arrangement and presented and filed the same in Court.

That on March 19th, 1954, your petitioners called an informal meeting of the creditors at the Credit Managers Association and presented informally the problems and the position of the Debtor requesting

the assistance and the cooperation of the creditors at said meeting and at such further meetings.

That your petitioners also prepared and sent to all creditors the form of "Acceptance by Creditors of Debtor's Plan of Arrangement."

That under date of April 14th, 1954, your petitioners prepared and filed a request for appointment and oath of appraiser by which H. A. Sheedy was appointed appraiser.

That on May 12th, 1954, your petitioners prepared and had signed an Order authorizing the Debtor to borrow money, to wit, the sum of \$4,500.00 from the Farmers & Merchants Bank of Long Beach for the purpose of making payment of the tax creditors.

That on May 18th, 1954, your petitioners caused to be copied and filed a Profit and Loss Statement prepared by the Debtor's accountant, C. B. Mulholland.

That on May 18th, 1954, your petitioners prepared and filed the "Debtor's List of Debts Paid and Extended as Required by the Court" for the purpose of determining the costs to be paid by the Debtor.

That your petitioners prepared and filed herein the Application for Confirmation of Arrangement, and under date of May 20th, 1954, filed an Order Confirming Arrangement after it appeared that the arrangement as originally filed and amended had been accepted by the majority in number and

amount of creditors. That said Order Confirming Arrangement was not actually signed until June 9th, 1954, at which time your petitioners presented to the Court for and on behalf of the Debtor the amounts to be paid to the Referee's salary fund and the Referee's expense fund and charge for special services as computed by the Clerk of the Court and in the total sum of \$502.92.

That in addition to each and all of the foregoing formal documents prepared and filed by your petitioners for and on behalf of the Debtor herein, there were numerous conferences as between your petitioners and the principals of the Debtor corporation, its employees, its accountant and its various creditors, which consumed many hours of time in discussing the problems of the Debtor and the proposed arrangement and the manner of submitting the plan to the creditors and to the Court. That in addition there were numberless telephone conversations and calls as between your petitioners and the principals of the debtor corporation, creditors, Taxing Agency representatives, attorneys for creditors and for Taxing Agencies, and others in interest, and further in addition there were letters either received by or sent to creditors, debtor and others in interest from the date of the filing of the petition to the 11th day of June, 1954, which was the date of the last letter to the District Director of Internal Revenue Service, that numbered approximately fifty (50) (some of them many pages long) letters other than mimeographed letters that went to all creditors

with forms of consent in the solicitation of the consents and the help and the cooperation of the creditors of the debtor to effect the plan and consummate the arrangement. That there are services yet to be rendered to the Debtor before the plan of arrangement will be finally carried out, which cannot as yet be anticipated.

That your petitioners have received at the time of their employment and as is reflected by the schedules on file herein, the sum of \$750.00 on account of legal services, and the further sum of \$45.00 for the filing fee of the petition herein.

That your petitioners believe that a further additional and reasonable fee to be paid to them for the services rendered herein is in the sum of \$3,500.00.

Wherefore, by reason of the foregoing and all thereof your petitioners pray that they be allowed a further additional and reasonable fee in the sum of \$3,500.00.

That your petitioners are mindful of the fact that the debtor may not have the present ability to pay such amount and are willing to accept the note of the debtor corporation to be paid in twelve equal monthly installments with interest at six per cent, and which sum, when allowed, being one of the costs and expenses of administration, shall be a lien on the assets of the debtor corporation until paid.

SAMUEL A. MILLER,
MASON & WALLACE.

By /s/ SAMUEL A. MILLER.

their petition asking for an additional allowance in the amount of \$3,500 compensation for services rendered to the debtor in these proceedings.

It further appearing that notice of hearing on said petition having been sent to the creditors and other interested parties, and it further appearing that said attorneys for debtor are willing to accept the note of the debtor corporation to be paid in twelve (12) equal monthly installments, with interest at six (6) per cent in payment of any allowance made herein,

Therefore It Is Ordered That compensation of Samuel A. Miller and Mason and Wallace, attorneys at law, be fixed in the amount of \$3,500 and that the debtor execute and deliver to them the note of the debtor corporation, payable in twelve (12) equal installments, with interest at six (6) per cent for the payment thereof, and that said note rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954.

Dated this 10th day of August, 1954.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed August 10, 1954, Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER

To the Honorable David B. Head, Referee in Bank-
ruptcy:

The petition of Samuel A. Miller & Messrs. Mason
& Wallace respectfully represents:

I.

Your petitioners are aggrieved by a portion of the Order made on the 10th day of August, 1954, a copy of which Order is annexed hereto, marked petitioners' Exhibit "A" and made a part hereof by reference.

II.

Your petitioners on June 18th, 1954, filed a Petition for Allowance to Attorneys for Debtor, which in part stated:

"That your petitioners are mindful of the fact that the debtor may not have the present ability to pay such amount and are willing to accept the note of the debtor corporation to be paid in twelve equal monthly installments with interest at six per cent, and which sum, when allowed, being one of the costs and expenses of administration, shall be a lien on the assets of the debtor corporation until paid."

III.

Your petitioners respectfully believe that you erred in that part of the Order of August 10th,

1954, (of which Order a copy is attached hereto marked petitioners' Exhibit "A") in which you directed:

"that said note rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954."

IV.

The effect of the quoted portion of the Order of August 10, 1954, quoted in the preceding paragraph, was to make your petitioners unsecured creditors on a parity with creditors who extended credit to the debtor corporation prior to the date of the filing of the debtor proceedings, but who rendered services subsequent to the filing of the debtor proceeding, which was a cost and expense of administration as provided for by Section 64a(1) of The Bankruptcy Act and as was provided for in the Plan of Arrangement, and said quoted portion of the Order was in error in that it imposed a condition upon the payment to be paid to your petitioners as attorneys for the debtor not intended or contemplated by your petitioners' petition for fees or by the terms of the arrangement or by the law applicable to fees to attorneys for debtors in confirmed plans of arrangement.

V.

That your petitioners because of their desire to be helpful to the debtor by expressing a willingness to accept a note payable as indicated are being penalized by the quoted portion of the Order of August 10th, 1954, and said quoted portion of the

Order of August 10th, 1954, is further in error in that it is contrary to the conditions upon which your petitioners indicated a willingness to accept a note payable in monthly installments as set forth in the petition for allowance to attorneys for debtor.

Wherefore, your petitioners pray that said Order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to bankruptcy; that the quoted and objectionable portion of the Order of August 10th, 1954, be reversed and/or modified to the end that the allowance ordered to be paid to your petitioners as attorneys for the debtor, being one of the costs and expenses of administration, shall constitute a lien on the assets of the debtor corporation subject to other liens presently of record, until paid.

SAMUEL A. MILLER,
MASON & WALLACE.

By /s/ SAMUEL A. MILLER.

Duly verified.

[Endorsed]: Filed August 20, 1954, Referee.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable James M. Carter, Judge of the United States District Court, Southern District of California, Central Division:

I, David B. Head, Referee in Bankruptcy of this court, do certify as follows:

On June 9, 1954, an order was entered herein confirming debtor's plan of arrangement. Thereafter and on June 18, 1954, Samuel A. Miller and Mason and Wallace filed a petition for allowance of fees as attorney for debtor. After notice to creditors and hearing on the petition, I entered an order allowing fees in amount of \$3,500.00 and provided:

“* * * the debtor execute and deliver to them the note of the debtor corporation, payable in twelve (12) equal installments, with interest at six (6) per cent for the payment thereof, and that said note rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954.”

Counsel had asked in their petition that “* * * which sum, when allowed, being one of the costs and expenses of administration, shall be a lien on the assets of the debtor corporation until paid.”

I was unable to make an order which would have created a lien against the debtor's property for the reason that I would have diminished the equity of general creditors in the estate after confirmation. Any priority the petitioners could have asserted under sections 64a(1) or 337(2) of the Bankruptcy Act was waived by not presenting their petition before confirmation so that the court could have required a deposit sufficient to cover any allowance, 8 Collier 567.

The order of confirmation provided:

“It Is Further Ordered, that the Debtor shall not further encumber its present assets until all creditors have been paid in full, or in the alternative, without first advising the creditors of its intention to further encumber its present assets.”

The petitioners have asked me to do what I had restrained the debtor from doing.

From that part of the order directing that they be classed as general creditors, the petitioners have filed a Petition for Review.

I further certify the following papers from my file.

- (1) Order of Confirmation.
- (2) Petition for Allowance.
- (3) Order re Allowance.
- (4) Petition for Review.

Dated: August 24, 1954.

Respectfully submitted,

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed August 24, 1954.

In the District Court of the United States, Southern
District of California, Central Division
No. 60220-C

In the Matter of
**HARRY SMITH MACHINE COMPANY, a Cali-
fornia Corporation,**
Debtor.

**ORDER AFFIRMING REFEREE'S ORDER
DENYING PRIORITY OF PAYMENT OF
ALLOWANCE TO ATTORNEYS FOR
DEBTOR**

The petition for Review filed by Messrs. Samuel A. Miller and Mason & Wallace as the attorneys for the above-named debtor, from that part of the Referee's Order that the compensation to said attorneys "rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954" came on regularly for hearing on the 4th day of October, 1954, at the hour of 10:00 o'clock a.m. in the Courtroom of the undersigned District Judge, Samuel A. Miller appearing on his own behalf and on behalf of his associate counsel, Messrs. Mason & Wallace, and no other appearances having been made, and the matter having been submitted to the Court upon all of the records, papers and files before it, including the Points and Authorities submitted by said Samuel A. Miller and Mason & Wallace, and the Court having considered the Petition to Review and being fully advised in the premises, now makes the following Order:

It Is Ordered that that part of the Findings of Fact, Conclusions of Law and Order thereon by David B. Head, Referee in Bankruptcy, dated August 10th, 1954, that the compensation of the attorneys for the debtor "rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954," be affirmed, and the Findings of Fact and Conclusions of Law of the Referee are adopted by the undersigned Court as the Findings of Fact and Conclusions of Law of the undersigned Court:

By reason of all of the foregoing, that part of the Order of the Referee reviewed that the compensation to the attorneys for the debtor "rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954," made on the 10th day of August, 1954, be and the same is hereby approved and affirmed.

Dated this 16th day of November, 1954.

/s/ JAMES M. CARTER,
District Judge.

Read and Approved as provided by Local Rule 7(a) of the District Court.

SAMUEL A. MILLER,
MASON & WALLACE.

By /s/ SAMUEL A. MILLER,
Attorneys for Debtor.

[Endorsed]: Filed November 17, 1954.

Judgment docketed and entered November 17, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS, NINTH CIRCUIT

Notice Is Hereby Given that Samuel A. Miller and Messrs. Mason & Wallace, attorneys for the debtor herein, duly appointed such under an Order of the Referee in Bankruptcy, do hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from an Order of the District Court herein, made, entered and docketed on the 17th day of November, 1954, which Order affirmed the Referee's Order denying priority of payment of allowance to attorneys for debtor; the Order of the Referee dated August 10th, 1954, from which a Petition for Review was taken, allowed the attorneys for the debtor as compensation the sum of \$3,500.00 and with reference to the payment of said sum ordered that said payment "rank equally with the debts to unsecured creditors covered by the Order confirming arrangement of June 9th, 1954."

Dated this 17th day of December, 1954.

SAMUEL A. MILLER,
MASON & WALLACE.

By /s/ SAMUEL A. MILLER,
Attorneys for Debtor.

[Endorsed]: Filed December 17, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS BY APPELLANTS
TO BE RELIED UPON ON APPEAL
(RULE 75 (d))

Comes now Samuel A. Miller and Messrs. Mason & Wallace, the appellants herein, and submit to the Honorable Judges of the Circuit Court of Appeals for the Ninth Circuit, the following "Statement of Points" to be considered on behalf of the appellants as the points involved in this appeal.

1. Did the Referee in Bankruptcy, Honorable David B. Head, err after making his Order of August 10th, 1954, allowing appellants the sum of \$3,500.00 as attorneys for the debtor, which amount the appellants indicated could be evidenced by a note of the debtor payable in twelve equal installments provided that such sum when allowed be one of the costs and expenses of administration and be a lien on the assets of the debtor corporation until paid, wherein in said Order it was provided with reference to the foregoing

"That said note rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954."

2. Does it not follow as a matter of law that such sum of money as may be allowed to attorneys for a debtor, who were appointed such under an appropriate Order of the Referee, is entitled to priority and is payable as one of the costs and expenses

of administration as provided by Section 64a(1) and Section 337 (2) of The Bankruptcy Act?

3. That the Referee erred in sending out the notice of meeting of creditors dated July 19th, 1954, "to hear application for allowance to Samuel A. Miller and Mason and Wallace as attorneys for debtor" when he failed to include in said notice a provision that any amount to be allowed by the Referee shall be a lien upon the assets of the estate of the debtor by reason of the priority of the claim for attorney's fees as provided by Section 64a(1) of The Bankruptcy Act.

Dated: December 28th, 1954.

Respectfully submitted,

SAMUEL A. MILLER,
MASON & WALLACE,

By /s/ SAMUEL A. MILLER,
Attorneys for Debtor and
Appellants Herein.

[Endorsed]: Filed December 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 66, inclusive, contain the origi-

nal Petition Under Chapter XI; Approval and Order of Reference; Petition for Arrangement Under Section 322; Amendment to Petition for Arrangement Under Section 322; Referee's Certificate on Review; Order of Confirmation; Petition for Allowance; Order re Allowance; Petition for Review; Referee's Supplemental Certificate on Review; Petition for Appointment of Attorneys; Order Appointing Attorneys for Debtor; Notice of Meeting of Creditors; Order Affirming Referee's Order Denying Priority of Payment of Allowance to Attorneys for Debtor; Notice of Appeal; Cost Bond; Statement of Points on Appeal and Designation of Record on Appeal which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this day of January, A.D. 1955.

[Seal]

EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 14631. United States Court of Appeals for the Ninth Circuit. In the Matter of Harry Smith Machine Company, a California Corporation, Debtor. Samuel A. Miller and Mason & Wallace, Appellants. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 20, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14631

In the Matter of
HARRY SMITH MACHINE COMPANY, a California Corporation,
Debtor.

**REQUEST TO INCLUDE IN RECORD ON
APPEAL CERTAIN DOCUMENTS**

To Paul P. O'Brien, Clerk of the United States
Court of Appeals for the Ninth Circuit:

Please be advised that it is the desire and request of the Appellant in the above-entitled matter, that the "Statement of Points by Appellant to be relied upon on appeal" (pages 63 and 64 of District Court Clerk's certified typewritten transcript of record), and the "Appellant's designation of contents of record on appeal" (pages 65 and 66), and which were filed by the Appellant with the Clerk of the District Court of the United States, Southern District of California, Central Division, be included in the record on appeal to be prepared as required by the rules of the above-entitled Court.

Dated: February 9th, 1955.

SAMUEL A. MILLER,
MASON & WALLACE.

By /s/ SAMUEL A. MILLER,
Attorneys for Debtor and
Appellant Herein.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 10, 1955.

